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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CALIFORNIA FEDERAL BANK, FSB

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE CROSS-PETITIONER

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As the cross-petition explains, the Federal Circuit in this case substantially departed from settled principles of administrative law and the law of contracts by construing exchanges of documents that reflected nothing more than the application for—and grant of—necessary regulatory approval for two private transactions as having created express contracts between the regulatory agency and the regulated entity. A change in regulatory policy, even one that affects the expectations of regulated entities, is ordinarily viewed not as a breach of contract, but rather is analyzed under the standards applicable under the Administrative Procedure Act. Those standards grant an agency "ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances,'" *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991), and, when that latitude is exceeded, authorize correction of the error and pre-

clude any award of damages, see 5 U.S.C. 702; cf. 28 U.S.C. 2680(a). By converting agency regulatory approval of a private transaction into a contract between the agency and the private entity, without any resulting agreement in the nature of a contract (or, indeed, any manifestation of an intent to contract), the court of appeals converted the change in regulatory policy into a breach of contract and substituted the unauthorized remedy of damages for the remedial scheme put into place by the APA. That holding is likely to have its most direct impact on the numerous *Winstar*-related cases pending in the Court of Federal Claims and the Federal Circuit, see *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), but the precedent it sets could pose difficulties for a wide variety of other agency actions as well. Accordingly, if the Court determines that interlocutory review of this case is appropriate at all, then it should grant such review to address the important antecedent issue of liability presented in the cross-petition.[1]

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[1] CalFed asserts (Br. in Opp. 17 n.5) that our decision to file only a conditional cross-petition for certiorari "undercut[s]" our "ostensible concern" with the court of appeals' decision in this case. To the contrary, the court's resolution of the liability question is an erroneous resolution of a fundamentally important issue. Nevertheless, as explained in the cross-petition (at 14) and in our brief in opposition to CalFed's petition (at 11-14), piecemeal review in this case is unwarranted. The Court will be in the best position to consider any issues on which the government or CalFed might seek review upon the conclusion of the lower court proceedings, thus avoiding piecemeal (and possibly unnecessary) review at this time. But if the Court concludes that review is warranted at this stage, the Court should resolve the antecedent question of liability presented in the cross-petition, which has significance not only in this case but also in many other *Winstar*-related cases pending in the courts below.

I. THE CROSS-PETITION PRESENTS A LEGAL, NOT A FACTUAL, QUESTION

CalFed mistakenly contends that "[t]he government does not argue that the courts below applied an improper legal standard," Br. in Opp. 10, and that the lower courts simply made "factual findings," *id.* at 12, for which further review is unwarranted. In the first place, the liability issues in this case (unlike the issues concerning remedy presented by CalFed in its petition for certiorari) were decided on summary judgment, as a matter of law. Accordingly, this is not a case in which a court has interpreted ambiguous evidence and the government "interprets the evidence differently." *Ibid.* Instead, it is a case in which there were no "factual findings" made by either lower court precisely because they disposed of the case by relying on a mistaken legal standard.

More fundamentally, the cross-petition seeks review of just that improper legal standard. The cross-petition explains that "[t]he courts below effectively converted a regulatory record into a binding contract," Cross-Pet. 16, and that "[a] court cannot properly find the existence of a contract * * * between the United States and a private party based on the issuance of documents by a federal agency that constitute regulatory approval of a private transaction," *id.* at 22. The "improper legal standard" is the court of appeals' position that a request for and grant of regulatory approval for a private transaction constitutes a contract between the regulatory agency and the regulated entity, even without any "manifestation of an intent to enter into a contract embodied in documents or conduct aside from the documents that record the agency's approval and the mere give-and-take of the regulatory process," *id.* at 23; see

also *ibid.* ("In a situation in which regulatory approval is required for a private entity to engage in a transaction, a determination by a court that the government has entered into a contract must be based on something more than a record of regulatory approval."). That legal standard "would not only violate ordinary principles of contract formation and administrative law," *id.* at 22, but would also violate the prohibition under the Tucker Act against recognizing contracts implied in law, *id.* at 24; see also *ibid.* (court of appeals' holding "conflicts with long-standing principles of administrative law").[2]

CalFed's reliance on the "two-court rule," see Br. in Opp. 12-13, is mistaken for the same reasons. Under that rule, this Court generally limits its reconsideration of *factual* determinations when a district court and court of appeals take the same view of disputed facts. Thus, in each of the cases cited by CalFed (see Br. in Opp. 12), the rule was invoked after a district court had reached a judgment on certain facts after full litigation of those facts. See, *e.g.*, *Berenyi* v. *District Dir.*, 385 U.S. 630, 634-636 (1967) (factual determination after extensive and conflicting testimony regarding whether

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[2] CalFed contends (Br. in Opp. 11) that "[w]hile this Court [in *Winstar*] granted the government's petition to consider (and, ultimately, reject) the availability of certain defenses asserted by the government, the Court left undisturbed the lower courts' determinations that the goodwill contracts at issue had been formed." The petition for a writ of certiorari in *Winstar* did not challenge (and the instant cross-petition does not challenge) the ruling that contracts had been formed in *Winstar*. The fact that this Court left that undoubtedly correct ruling "undisturbed" in *Winstar* has nothing to do with the question whether review is warranted on the question whether contracts were formed in this case.

petitioner had been a member of the Communist Party); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 274-275 (1949) (facts about whether there has been patentable invention based on three-week trial). The two-court rule does not limit Supreme Court review in cases like this, in which two courts have mistakenly applied the law in granting summary judgment based on a set of uncontested facts; such cases may well (and this case does) present legal issues that warrant further review.

II. THE COURT OF APPEALS' DECISION IS NOT SUPPORTED BY THIS COURT'S DECISION IN *WINSTAR*

CalFed argues (Br. in Opp. 14-16) that "[t]he courts below faithfully applied the teaching of *Winstar*" and that "[t]he conclusion of both lower courts that goodwill contracts were formed is plainly correct." *Id.* at 14. In CalFed's view, "[i]n each of the three transactions, CalFed made an offer to contract with the government, promising to acquire one or more failing thrifts in exchange for the right to include supervisory goodwill in calculating its regulatory capital," and "[t]he government accepted each of these offers." *Ibid.*

1. CalFed's statement identifies precisely the error in the court of appeals' decision.[3] A great many federal agency actions could certainly be characterized as the submission by a regulated entity of an "offer" in the

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[3] Our comments throughout this reply brief are limited to the two transactions at issue in the cross-petition. The third transaction to which CalFed repeatedly refers in its brief in opposition —its acquisition of Southeast—is not at issue in the cross-petition. We have never disputed that the Assistance Agreement concerning the Southeast transaction was a contract. See Cross-Pet. 4-6.

form of a request for agency approval to take an action, followed by a regulatory "acceptance" in the form of an expression of approval to take the action, with or without additional conditions. Review of those agency actions, however, occurs under administrative law standards governing judicial review of agency action under the APA, not the law of contracts, and the remedy for any violation in such cases is to set aside the agency action, not to award damages. See Cross-Pet. 24-28. To construe a regulatory approval as a contract "would be to limit drastically the essential powers of a[n] [administrative] body." *National R.R. Passenger Corp.* v. *Atchison, Topeka, & Santa Fe Ry.*, 470 U.S. 451, 466 (1985). See Cross-Pet. 25-26.[4]

The undisputed record in this case is no different from the record of any request by a regulated entity for a regulatory agency to take certain regulatory action and a consequent decision by the agency to take that action. Indeed, what is most striking about this case—and what squarely presents the legal issue in the cross-petition—is the complete absence of any documentation or other contemporaneous evidence that the parties intended to form a contract, rather than seek

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[4] CalFed asserts (Br. in Opp. 18-19) that our reliance on *National Railroad Passenger Corp.* is unavailing in light of the Court's decision in *Winstar*. None of the opinions in *Winstar*, however, questioned the continued authority of *National Railroad Passenger Corp.*, which is directly on point here in explaining the impermissibility of construing a governmental regulatory action as a contractual undertaking. In *Winstar*, the Court did reject our "unmistakability doctrine" argument, see 518 U.S. at 871-888, but that doctrine has to do with contract *interpretation*, not (as in this case) the contract *formation* question of whether a court may construe a regulatory action, unaccompanied by any manifestation of intent to contract, as a contract.

and obtain the necessary regulatory approval for private transactions. For example, the sole documents that CalFed cites as the "offer to contract with the government," Br. in Opp. 14, in connection with its acquisition of Brentwood are an "Application * * * for Merger" submitted by CalFed and a subsequent letter from CalFed to the Bank Board. 3 C.A. App. A5002254-A5002264, A5002329-A5002331. The documents CalFed cites for the Bank Board's "acceptance" of the alleged contract are simply the Bank Board resolution that approves the merger subject to certain conditions, see *id.* at A5002319-A5002321, and an accompanying letter reciting that the Bank Board had "determined to exercise supervisory forbearance, to grant waivers and to confirm the manner of application of certain regulatory requirements," *id.* at A5002322. The documents concerning CalFed's acquisition of Family are similar. Neither the supposed "offer" nor the supposed "acceptance" uses the language of contract; the terms "offer," "acceptance," "contract," "agreement," "consideration," and their derivatives are entirely absent. The court of appeals' error consisted precisely in determining that such documents, which consist only of a request for and the issuance of formal regulatory approval, could, without more, could be construed as a contract.[5]

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[5] CalFed states (Br. in Opp. 4) that it was "induced" to acquire Family and Brentwood by the "government's goodwill promises." The trial court similarly stated sweepingly that it agreed with CalFed's position that government "induce[ment]" based on "promises regarding supervisory goodwill and capital compliance" was "[t]he common operative fact in all *Winstar*-type transactions." 01-592 Pet. App. 86a. Neither CalFed nor the trial court cited any evidence for the proposition that the government had "induced" CalFed to acquire either Brentwood or Family, rather than permitted CalFed to acquire those institutions at its own initiative

CalFed cites (Br. in Opp. 15) one item of nondocumentary noncontemporaneous evidence: a statement in a declaration of a former Bank Board employee, D. James Croft, obtained by CalFed during the litigation, a decade after the events at issue. See 3 C.A. App. A5002914-A5002915. Crucial details of Croft's affidavit were disputed, and they accordingly could not have been (and were not) relied upon by either court below in granting and affirming summary judgment to CalFed on liability. Croft was not, as CalFed states (Br. in Opp. 15), "ultimately responsible for approving all three transactions at issue;" the Bank Board itself had that legal responsibility. Moreover, Croft's declaration stated that he handled "supervision and examination issues" during the period at issue, not regulatory approvals. See 3 C.A. App. A5002909. Most significantly, his apparent statement that the Bank Board believed regulatory forbearances to be the same as contracts was directly contradicted by the declaration of Lawrence Hayes, the FHLBB's former Deputy General Counsel, who actually drafted assistance agreements, resolutions, and forbearance letters. See *id.* at A5001450-A5001451. He explained:

> Forbearances were different in nature from assistance agreements. Assistance agreements were entered into not by the Bank Board, but by FSLIC under its authority to contract for the provision of assistance. Forbearances, on the other hand, were issued by the Bank Board pursuant to a Bank Board

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and for its own business purposes. See Cross-Pet. 18 n.2. The court of appeals accordingly did not cite or rely on any supposed "inducement" as support for its conclusion that contracts had been formed between the regulators and CalFed.

> resolution. Forbearances were regulatory in nature; they were not intended to be contractual.

Id. at 5001451.

CalFed is correct (Br. in Opp. 15) that our position is that separate contractual documents—or at least a manifestation by each party of intent to enter into a contract—is necessary in order for a court to find the existence of a contract that could, in turn, incorporate certain regulatory orders or documents. That, indeed, was the logic of the plurality's opinion in *Winstar*, which began with the contracts between the parties (the Assistance Agreements) and then concluded that the integration clauses of those contracts had given those otherwise non-contractual, regulatory documents (the Bank Board resolutions and forbearance letters) contractual significance. Specifically, the plurality concluded that FSLIC, in entering into the Assistance Agreements, had agreed to assume the risks of a change in the regulatory policy. See Cross-Pet. 20-21 (discussing 518 U.S. at 863, 868-869, 871, 881-883, 888-890, 907-908, 909-910); see also *id.* at 918 (Breyer, J., concurring); *id.* at 919-920, 923 (Scalia, J., concurring in the judgment). Under CalFed's theory, that reasoning would have been entirely unnecessary, because the Bank Board resolutions and letters would have been contractual undertakings in and of themselves, regardless of the Assistance Agreements. Although CalFed is correct (Br. in Opp. 16) that "contracts need not have an integration clause to be binding," a request for regulatory action and consequent decision by the regulator to take that action is not a contract, particularly in the absence of any indication of mutual intent to contract. In this case, the undisputed evidence is that neither party to the supposed "contracts"—neither CalFed nor

the Bank Board—manifested any intent to form a contract.

2. CalFed contends (Br. in Opp. 17) that our "attempt to distinguish between the FHLBB's and FSLIC's 'contractual' undertakings and their 'regulatory' undertakings is nothing less than an attempt to reargue *Winstar*." In *Winstar*, the plurality indeed stated that the two capacities were "fused *in the instances under consideration*." 518 U.S. at 894 (emphasis added). That conclusion makes clear that in other instances *not under consideration* in *Winstar* itself—such as CalFed's acquisitions of Brentwood and Family, in which there was *no* separate agreement of a contractual nature and indeed *no* manifestation whatever of an intent to contract (and in which the parties appear to have taken care precisely to avoid any such manifestation)—the two capacities were *not* so fused. As explained above and in the cross-petition, this Court's decision in *Winstar* was not an open grant to courts of authority to construe agency regulatory actions as contracts, and the plurality's reasoning in *Winstar* conflicts with—rather than supports—the court of appeals' conclusion in this case.

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For the reasons stated above and in the cross-petition, if the Court grants the petition for a writ of certiorari in No. 01-592, it should also grant the cross-petition for a writ of certiorari.

Respectfully submitted.

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Acting Solicitor General *

JANUARY 2002

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* The Solicitor General is disqualified in this case.